
**IN THE
SUPREME COURT OF MISSOURI**

No. SC85565

KENNETH S. SMITHER,

Respondent,

v.

**DIRECTOR OF REVENUE,
STATE OF MISSOURI,**

Appellant.

**Appeal from the Platte County Circuit Court
The Honorable Daniel M. Czamanske, Judge**

Appellant's Substitute Brief

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Jurisdictional Statement

The Director of Revenue revoked respondent Kenneth Smither's driving privileges for refusal to submit to a blood alcohol test. The Circuit Court of Platte County reinstated Smither's driving privileges, and the Director appealed. After an opinion by the Court of Appeals, Western District, this Court took transfer of the case on the Director's application. Therefore, jurisdiction lies in this Court. Article V, Section 10, Missouri Constitution (as amended, 1982).

Statement of Facts

In the early morning hours of December 23, 2001, Trooper Salfrank of the Missouri State Highway Patrol was called to a wreck in the area of I-29 and MO 152 (Tr. 3-4; Respondent's Exhibit A; Appendix at A-12).¹ When he arrived, he saw an overturned vehicle resting against the concrete barrier on the side of the interstate (Tr. 4; Respondent's Exhibit A; Appendix at A-12). He determined that the driver had driven off the ramp going from MO 152 onto northbound I-29, hit an embankment, and rolled the car onto its top (Tr. 5). The vehicle came to rest after crossing three lanes of I-29 and hitting the concrete barrier (Tr. 5).

¹ **The Director, who was respondent below, offered, and the trial court admitted, Respondent's Exhibit A, Missouri Department of Revenue records (Tr. ii, 33). The Director filed this exhibit with the Court of Appeals, Western District, prior to transfer and has attached a copy of the exhibit to this brief as part of the Appendix (Appendix at A-5 to A-18).**

At the scene, Trooper Salfrank located Smither lying on the ground behind the overturned vehicle (Tr. 7). The trooper determined that Smither was the driver (Tr. 7, 11-12). Smither said he could not remember what happened (Tr. 7; Respondent's Exhibit A; Appendix at A-12).

Trooper Salfrank stayed with Smither until he was placed into an ambulance (Tr. 7; Respondent's Exhibit A; Appendix at A-12). In the ambulance, the trooper noticed the smell of an alcoholic beverage on Smither's breath (Tr. 7-8; Respondent's Exhibit A; Appendix at A-12). Trooper Salfrank also noticed that Smither had watery, bloodshot, staring eyes, and was mumbling, sleepy, and uncooperative (Respondent's Exhibit A; Appendix at A-8).

Trooper Salfrank responded to Liberty Hospital where he located Smither in the emergency room (Tr. 8; Respondent's Exhibit A; Appendix at A-12). At the hospital, Smither told the trooper that he had been drinking that night (Tr. 8; Respondent's Exhibit A; Appendix at A-12). Trooper Salfrank then performed the gaze nystagmus test on Smither and observed a lack of smooth pursuit, onset prior to 45 degrees, and distinct nystagmus at maximum deviation, all in both eyes (Tr. 8-9; Respondent's Exhibit A; Appendix at A-8, A-12). The trooper was not able to perform other field sobriety tests because of Smither's condition after the wreck (Respondent's Exhibit A; Appendix at A-12).

Believing Smither to be intoxicated, Trooper Salfrank advised Smither that he was under arrest (Respondent's Exhibit A; Appendix at A-12). Trooper Salfrank read

the *Miranda*² warning and Implied Consent Law to Smither (Tr. 9-10; Respondent's Exhibit A; Appendix at A-9, A-10, A-12). Smither responded by asking to contact his attorney (Tr. 10; Respondent's Exhibit A; Appendix at A-10, A-12).

Smither agreed to let hospital personnel contact his parents, who then contacted an attorney; Trooper Salfrank waited forty minutes for Smither to contact an attorney (Tr. 10-11; Respondent's Exhibit A; Appendix at A-12). After forty minutes, Smither's parents had contacted an attorney but the attorney had not called back (Tr. 11; Respondent's Exhibit A; Appendix at A-12). Trooper Salfrank repeated his request that Smither submit to the test (Tr. 11; Respondent's Exhibit A; Appendix at A-12). Smither refused to submit to the blood alcohol test or to answer any more questions (Tr. 11; Respondent's Exhibit A; Appendix at A-10, A-12). Trooper Salfrank issued Smither a notice of revocation for failing to submit to the test, a summons for driving while intoxicated, and a summons for careless and imprudent driving (Tr. 11; Respondent's Exhibit A; Appendix at A-7, A-12).

On January 16, 2002, Smither filed a petition seeking review of the revocation (LF 7-8). At the hearing on May 2, 2002, the Director presented the testimony of Trooper Salfrank; Smither testified on his own behalf (Tr. 2, 22).

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The trial court, following the close of the evidence, found that Smither was not arrested, that the trooper had reasonable grounds to believe that Smither was driving a motor vehicle while in an intoxicated condition, and that Smither refused to submit to a blood alcohol test (Tr. 43-44). In its written judgment, filed May 20, 2002, the court indicated that it found “not all issues in the affirmative” and reinstated Smither’s driving privileges (LF 15). The Director of Revenue timely appealed on June 19, 2002 (LF 20).

Point Relied On

I.

The trial court erred in reinstating Smither's driving privileges because the Director presented a prima facie case and Smither did not rebut it, in that the Director showed reasonable grounds and refusal, and, as to arrest, the Director showed that while Trooper Salfrank did not handcuff the hospitalized Smither, he told Smither that he was under arrest, read him his rights pursuant to *Miranda v. Arizona* and the Implied Consent Law, and issued summonses to him, and Smither submitted to the trooper's show of authority in these respects by invoking his rights, asking to contact an attorney, and otherwise failing to manifest any sign or suggestion that he was not accepting the trooper's assertion of authority over him.

Saladino v. Director of Revenue, 88 S.W.3d 64 (Mo.App., W.D. 2002);

Knipp v. Director of Revenue, 984 S.W.2d 147 (Mo.App., W.D. 1998);

U.S. v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980);

§544.180, RSMo 2000;

§577.041.4, RSMo 2000

Argument

I.

The trial court erred in reinstating Smither's driving privileges because the Director presented a prima facie case and Smither did not rebut it, in that the Director showed reasonable grounds and refusal, and, as to arrest, the Director showed that while Trooper Salfrank did not handcuff the hospitalized Smither, he told Smither that he was under arrest, read him his rights pursuant to *Miranda v. Arizona* and the Implied Consent Law, and issued summonses to him, and Smither submitted to the trooper's show of authority in these respects by invoking his rights, asking to contact an attorney, and otherwise failing to manifest any sign or suggestion that he was not accepting the trooper's assertion of authority over him.

This refusal case focuses on the issue of arrest, and what an officer must do to effectuate the arrest of an injured person.

Standard of review

Review of a circuit court's decision to reinstate driving privileges after they have been revoked is the same as in any other judge-tried case. *Endsley v. Director of Revenue*, 6 S.W.3d 153, 157 (Mo.App., W.D. 1999). The standard of review for a court-tried civil case is governed by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the

evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Id.*, 536 S.W.2d at 32; *Wilson v. Director of Revenue*, 35 S.W.3d 923, 925-926 (Mo.App., W.D. 2001). An appellate court should set aside a judgment on the basis that it is against the weight of the evidence only when it has a firm belief that the judgment is wrong. *Wilson v. Director of Revenue*, 35 S.W.3d at 926, citing *Sutton v. Director of Revenue*, 20 S.W.3d 918, 923 (Mo.App., S.D. 2000). But, “[d]eference to the trial court’s findings is not required when the evidence is uncontroverted and the case is virtually one of admitting the facts or when the evidence is not in conflict.” *Id.*

The Director’s prima facie case

In order to revoke Smither’s driving privilege, the Director was required to prove only three things: 1) whether the officer had reasonable grounds to believe that the driver was driving while intoxicated, 2) whether the driver was arrested, and 3) whether the driver refused to submit to a test of his blood alcohol content. Section 577.041.4, RSMo 2000; *Berry v. Director of Revenue*, 885 S.W.2d 326, 328 (Mo. banc 1994).

As to reasonable grounds and refusal, the trial court, on the record, found that the Director had met her burden of proof on these two elements (Tr. 43-44). Suffice it to say, as to reasonable grounds, the trooper was justified in his belief that Smither had been driving while intoxicated. He came upon a one car wreck, found that Smither smelled of an alcoholic beverage, and Smither’s performance on the horizontal gaze

nystagmus test showed impairment (Tr. 3-9; Respondent's Exhibit A; Appendix at A-8, A-12). On similar facts, an officer has been found to have reasonable grounds. *See Soest v. Director of Revenue*, 62 S.W.3d 619, 621 (Mo.App., E.D. 2001) (officer had reasonable grounds where driver was weaving on the roadway, admitted that she had one beer, and performed poorly on the horizontal gaze nystagmus test). This is especially so where, as here, the driver is injured to the extent that other field sobriety tests cannot be done (Tr. 16; Respondent's Exhibit A; Appendix at A-12). *See infra*. Finally, Smither presented no evidence to suggest that it was unreasonable for the trooper to conclude that he was driving or that he was doing so while under the influence of alcohol or drugs.

As to refusal, Trooper Salfrank testified that he asked Smither to submit to a test of his blood, and Smither refused (Tr. 11; Respondent's Exhibit A; Appendix at A-12). Smither has never disputed this.

Arrest

Missouri statutorily defines what constitutes an arrest: "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority of a warrant or otherwise." Section 544.180, RSMo 2000. Historically, Missouri courts have therefore found that an arrest occurs when the subject's "freedom of movement is restrained by physical force or a show of authority. Such restraint exists when 'a reasonable person would have believed that he was not free to leave.'" *State v. Dixon*, 655 S.W.2d 552, 553, n.2 (Mo.App., E.D. 1983), *cert. denied*, 464 U.S. 1072, 104

S.Ct. 982 (1984), *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997), *quoting* *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980); *see also*, *State v. Neher*, 726 S.W.2d 362, 364 (Mo.App., W.D. 1987); *U.S. v. Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877 (“[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”).

In the context of a fleeing suspect, the Court of Appeals, Western District, has held that the officer must actually restrain the subject in some fashion, or the subject must submit to the custody of the officer. *State v. Nicholson*, 839 S.W.2d 593, 596-597 (Mo.App., W.D. 1992).

There, the Western District adopted the rationale of the United States Supreme Court in *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547 (1991). In *Hodari D.*, the subject had fled on foot upon the approach of an unmarked police car, and he discarded some crack cocaine before being caught by an officer. *Id.*, 499 U.S. at 622-623, 111 S.Ct. at 1549. The Supreme Court considered only the issue of whether Hodari D. had been “seized” when he dropped the cocaine, *id.*, 499 U.S. at 623-624, 111 S.Ct. at 1549, and concluded that he had not been seized at that point because he had been neither physically restrained nor had he submitted to a show of authority. *Id.*, 499 U.S. at 625-627, 111 S.Ct. at 1550-1551. But *Hodari D.* reiterates that the test for whether an officer has displayed a show of authority is an objective one: “whether the officer’s words and actions would have conveyed that to a reasonable person.” *Id.*, 446 U.S. at 628, 111 S.Ct. at 1551.

Applying the teaching of *Hodari D.* in a license revocation context, the Court of

Appeals, Western District has noted that “[a]rrest is not effected, absent physical restraint, if the suspect does not yield to the officer’s ‘show of authority.’” *Callendar v. Director of Revenue*, 44 S.W.3d 866, 869 (Mo.App., W.D. 2001), *citing State v. Nicholson*, 839 S.W.2d at 597. And, [a]n arrest does not occur merely because the officer announces the fact.” *Saladino v. Director of Revenue*, 88 S.W.3d 64, 68 (Mo.App., W.D. 2002), *citing Callendar v. Director of Revenue*, 44 S.W.3d at 868. But, where a driver is injured, as opposed to fleeing, courts of this state have recognized the practicalities in such situations, and have held that “it often makes little sense for the arresting officer to restrain an already-immobilized suspect following and injury accident.” *Saladino v. Director of Revenue*, 88 S.W.3d at 68-69, *citing State v. Setter*, 721 S.W.2d 11, 17 (Mo.App., W.D. 1986) and *Knipp v. Director of Revenue*, 984 S.W.2d 147, 149, 151 (Mo.App., W.D. 1998). And our courts have so held with good reason: “[a]pplying additional restraints in such a case is redundant at best; at worse, it may interfere with medical treatment or aggravate the suspect’s injuries.” *Saladino v. Director of Revenue*, 88 S.W.3d at 69.

Here, there is no evidence that Trooper Salfrank handcuffed or otherwise physically touched or restrained Smither. But the evidence does show that Trooper Salfrank arrested Smither, either on the theory that his announcement of arrest, coupled with Smither being an injured patient in a hospital bed, constituted constructive restraint, or on the theory that he asserted his authority over Smither and Smither submitted to that authority.

At the hospital, Trooper Salfrank told Smither that he was under arrest for DWI (Tr. 9; Respondent's Exhibit A; Appendix at A-12). He also read Smither the *Miranda* warnings and the Implied Consent Law. (Tr. 9-10; Respondent's Exhibit A; Appendix at A-9, A-10, A-12). Smither then asked if he could contact his attorney (Tr. 9-10; Respondent's Exhibit A; Appendix at A-9, A-10, A-12). Although there is no indication of Smither's precise medical condition at the hospital, the trooper did testify that Smither was unable to perform the walk and turn or one leg stand tests (Tr. 16; Respondent's Exhibit A; Appendix at A-12). Moreover, the record shows that Smither did not make the call to his attorney himself; he allowed hospital personnel to call his parents, who in turn called his attorney (Tr. 10-11; Respondent's Exhibit A; Appendix at A-12).

Trooper Salfrank waited forty minutes for Smither to hear back from his attorney (Tr. 11; Respondent's Exhibit A; Appendix at A-12). After forty minutes, Trooper Salfrank again asked Smither if he would submit to a test of his blood and Smither refused (Tr.11; Respondent's Exhibit A; Appendix at A-10, A-12). After Smither's refusal, Trooper Salfrank issued summonses to Smither for driving while intoxicated and careless and imprudent driving (Tr. 11; Respondent's Exhibit A; Appendix at A-12). Trooper Salfrank noted in his report that Smither had been placed under arrest (Respondent's Exhibit A; Appendix at A-12).

The record, therefore, contains substantial evidence that Smither was arrested. First, the trooper's announcement, coupled with the fact that Smither had been taken

by ambulance to the hospital, constituted physical restraint. There is no need to physically restrain a driver where his injuries prevent him from leaving, *see Knipp v. Director of Revenue*, 984 S.W.2d at 149; while the precise nature of Smither's injuries does not appear in the record, we do know that he was in the hospital. Moreover, Smither was taken directly from the scene of the wreck to the hospital via ambulance, and the trooper could not perform any field sobriety tests that required Smither to stand (Respondent's Exhibit A; Appendix at A-12). Therefore, as in *Saladino*, further restraint by the officer was unnecessary; the trooper's repeated announcements of arrest, coupled with Smither's inability to leave, constitute arrest.

Further, and in any event, Smither submitted to the trooper's show of authority. As in *Saladino*, the officer read the Implied Consent Law and *Miranda* warnings, and indicated in his report that he had advised Smither that he was under arrest (Tr. 9-10; Respondent's Exhibit A; Appendix at A-9, A-10, A-12). And Trooper Salfrank went further than the officer in *Saladino* - he issued summonses to Smither (Tr. 11; Respondent's Exhibit A; Appendix at A-12). In response, Smither submitted to Trooper Salfrank's show of authority - he behaved just like a person under arrest. He acknowledged his receipt of rights and invoked them (he attempted to contact his attorney) and apparently accepted the summonses (Tr. 11). Smither testified in the trial court, but he never indicated that he told Trooper Salfrank to leave at any time, that he refused to accept or tore up the summonses that Trooper Salfrank issued to him, or in

any other way gave the impression that whatever Trooper Salfrank's activities, he was not having any of it. Indeed, Trooper Salfrank waited for forty minutes for Smither's attorney to call back and there is no indication that Trooper Salfrank left Smither's room or the hospital during this time, or that Smither ever asked him to do so.

As noted, submission to an officer's show of authority, in a flight context, has been defined as assenting to the directives of the officer without attempting to leave the premises. *State v. Nicholson*, 839 S.W.2d at 596-597. But, as here, where a subject is injured and hospitalized, leaving may not be physically possible. If it is not possible, however, that does not, and should not, preclude a subject from submitting in other ways. Smither did not get up from his hospital bed and leave, but as detailed above, he did other things that showed that he was acquiescing to the trooper's directives nonetheless.

In sum, Trooper Salfrank did all that was reasonably necessary to effectuate the arrest of an injured and hospitalized Smither. Though the record is not entirely clear on this point, it appears that Smither was unable to physically leave; if he was able, he did not do so, and if he was not, he made no protestations to suggest that he was not submitting to Trooper Salfrank's manifestations of authority. In either event, Smither was certainly injured to some extent, given the transport by ambulance and admission to the hospital. And our courts have recognized that policy concerns will come into play should they require officers to physically restrain already immobilized drivers. *Saladino v. Director of Revenue*, 88 S.W.3d 69. Officers should not be forced to make or

solicit medical judgments, and either forgo arrest or physically restrain injured individuals at the risk of doing further harm and facing civil lawsuits.

Callendar v. Director of Revenue, which the parties discussed before the trial court (Tr. 39-40), is distinguishable.³ In *Callendar*, the officer testified that he had not intended to arrest the suspect and that the officer did not believe he had done so. *Id.*, 44 S.W.3d at 869. The officer did not issue any citations to Callendar, nor did he indicate on his reports that Callendar was arrested. *Id.* The only time the officer informed Callendar that she was under arrest was during the reading of the Implied Consent Law. *Id.* The Court of Appeals, Western District, held that the Director had failed to establish that Callendar was arrested - she was not physically restrained and she did not submit to the officer's authority. *Id.*

In contrast, as detailed above, the facts show that Trooper Salfrank arrested Smither: Trooper Salfrank said he arrested Smither (Respondent's Exhibit A; Appendix at A-12) and believed that he had arrested Smither (Tr. 21); Trooper Salfrank issued summonses to Smither (Tr. 11; Respondent's Exhibit A; Appendix at A-12); Trooper

³ At the time of Smither's hearing on May 2, 2002 (Tr. 2), *Saladino v. Director of Revenue* had not yet been decided.

Salfrank wrote on his reports that he had advised Smither that he was under arrest (Respondent's Exhibit A; Appendix at A-12); and when Trooper Salfrank advised Smither of his rights, Smither acknowledged and invoked them (Tr. 9-11; Respondent's Exhibit A; Appendix at A-12). Though not physically restrained, Smither was hospitalized and Trooper Salfrank advised him repeatedly that he was under arrest. Short of merely laying hands on Smither, and reducing arrest to a game of tag, or keeping constant vigil at Smither's bedside (though it appears that Trooper Salfrank was at the hospital, at least, for a minimum of forty minutes (Tr. 10-11; Respondent's Exhibit A; Appendix at A-12)), Trooper Salfrank could have done little else to show that he had asserted his authority over Smither, and that Smither submitted to it.

In considering this case, the Western District found that *Saladino v. Director of Revenue* and *State v. Setter* entailed restraint, as opposed to submission to authority, with the caveat that Saladino, like Setter before him, was "constructively restrained," because "actual restraint...would have occurred in conjunction with the officer's announcing that the defendant was under arrest, but because the defendant was, in effect, already restrained and could not leave the premises due to his injuries, it was unnecessary for the officer to further restrain the defendant in order to effectuate the arrest." *Smither v. Director of Revenue*, No. WD61535, slip op. at 8 (Mo.App., W.D. July 2, 2003). According to the Western District, the Director did not show actual or constructive restraint of Smither, and could not avail herself of the holding in *Saladino*, because Trooper Salfrank did not testify that but for Smither's injuries, he would have

physically restrained him. *Id.*, slip op. at 9.

But such rote questioning, after the fact, should not drive the inquiry of whether a driver was arrested. Further, the question would be objectionable as calling for speculation. Trooper Salfrank restrained Smither to the extent that he told Smither he was under arrest, Smither was hospitalized and appeared unable to do field sobriety tests that required standing, and further physical restraint was unnecessary; what Trooper Salfrank would have done, had Smither not been injured, is of no moment.

The Western District also determined, incorrectly, that Smither did not submit to the trooper's show of authority. While evidence that Smither was hospitalized was apparently not enough to carry the day on restraint absent Trooper Salfrank's post hoc reflections on what he would have done, evidence that Smither was hospitalized, according to the Western District, showed that "he really had no choice as to whether to submit to the trooper's authority or attempt to leave, forcing the trooper to actually physically restrain him. The only reasonable inference is that [Smither] was refusing to submit to the trooper's authority." *Smither v. Director of Revenue, supra*, slip op. at 10. To the contrary, even bedridden, Smither had lots of choices: he could have said nothing at all, he could have declined to invoke his rights, he could have decided not to contact an attorney or request the opportunity to do the same, he could have asked Trooper Salfrank to leave his room, or he could have just ignored him. Strangely, the Western District refuses to accept that Smither's condition, together with the trooper's arrest announcements, constituted physical restraint, but Smither's condition, almost

by itself and apart from his other actions, deprived him of his free will. This simply cannot be the rule.

Summary

Reasonable grounds and refusal have never been in dispute here; as to the only remaining issue, arrest, the Director shouldered her burden. While Trooper Salfrank did not handcuff the hospitalized Smither, that is not the only way to effectuate an arrest; Trooper Salfrank told Smither that he was arrested, informed him of his rights, and issued summonses to him. This, combined with the fact that Smither was hospitalized, was enough to effectuate arrest. Further, and in any event, a reasonable person would not believe that he was free to leave under these circumstances. Indeed, in response to Trooper Salfrank's words and actions, Smither submitted to the trooper's show of authority by invoking his rights and attempting to contact his attorney. Fundamentally, Smither acted like a person under arrest because he was.

Conclusion

In view of the foregoing, respondent submits that this Court should reverse the judgment of the trial court and remand the case with orders to the trial court to reinstate the Director's revocation of Smither's driving privileges.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 8th day of December, 2003, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,571 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Associate Solicitor

APPENDIX

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